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Supreme Court of the United States

October Term, 1957

No. 70

ALBERT L. TROP,

Petitioner,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE,

Defendants-Appellees.

SUPPLEMENTAL BRIEF FOR PETITIONER

(On Reargument)

Subsequent to the argument before this Court this case was heard in the finals of the Yale Law School moot court competition. The students [1] who there presented petitioner's case advanced a theory of statutory construction which had not occurred to the undersigned. It was received with respect by the "bench" [2] before which the moot case was argued, and merits consideration by this Court.

It will be recalled that the statute [Nationality Act of 1940, Section 401(g), quoted in full at page 2 of petitioner's original brief] provides for loss of nationality by reason of desertion in time of war and court martial conviction "thereof" and dishonorable discharge "as the result of such conviction"—*i.e.*, conviction for desertion.

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[1] Barry Sidman, Thomas Cecil Wray, Jr. and Richard Reisman.

[2] Mr. Justice Reed, formerly of this Court, Judges Bazelon and Soboloff of Courts of Appeals; Dean Griswold of Harvard, and Hon. Harrison Tweed, Chairman of the New York Temporary Commission on Courts.

In the case at bar petitioner was charged with three offenses committed in 1944 (R. 8, 9). The first involved two escapes, in violation of Article 69 of the Articles of War; the second, absence from duty on the occasion of the first escape, in violation of Article 61; the third, desertion following the second escape, in violation of Article 58. The court martial made a single finding of guilt with respect to all three of the charges (R. 9). On this finding it imposed a single, though composite sentence: dishonorable discharge, forfeiture of pay and three years hard labor (R. 9).

On this record, how can it be said that the dishonorable discharge was, as the statute requires, imposed "as the result" of the conviction for desertion? There is no way of determining to what extent the convictions for the two escapes or the absence from duty contributed to the result. In view of the fact that the desertion here charged lasted for one day only, that there was no contact with the enemy or attempt to make such contact, and that petitioner voluntarily surrendered while walking *back* toward Casablanca (see reply brief, p. 1, in No. 710, Oct. 1956 Term), it is reasonable to suppose that the court martial would not have imposed the severe penalty of dishonorable discharge with apparent loss of nationality if petitioner had been guilty of this offense alone.

Since the penalty of dishonorable discharge could have been imposed solely by reason of the conviction on either of the other convictions,[3] this Court must speculate to determine whether or not the conviction for the very minor desertion formed any basis for the dishonorable discharge. Loss of nationality should not be permitted to rest on such an uncertain basis.

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[3] Under the 1928 Manual for Courts Martial (which was in force in 1944) a dishonorable discharge might be imposed on conviction for escape in violation of Article 69 (see p. 98). While no such punishment could be inflicted for conviction under Article 61 (for absence without leave) under the tables contained in the 1928 Manual (see p. 97) all limitations in respect to that offense had been lifted in 1942 (7 F. R. 9221).

Otherwise stated, the argument is that where one or more factors contribute to a given result it cannot be said that the event "resulted" from any particular factor. It is elementary, for instance, that a jury's verdict will not be allowed to stand where it might have rested on more than one set of circumstances if one of the sets was improperly submitted to it (*Stromberg* v. *California*, 283 U. S. 359; *Bollenbach* v. *United States*, 326 U. S. 607; cf. *Yates* v. *United States*, 354 U. S. 298). That is so because it cannot be fairly said that the verdict was the "result" of any particular set of circumstances. So here, it cannot fairly be said that the sentence of dishonorable discharge was the "result" of the desertion conviction rather than of the conviction for the two escapes or for the absence from duty. As a conviction "ought not to rest on an equivocal direction to the jury on a basic issue",[4] so here loss of nationality should not result from an equivocal sentence by a court martial.

Respectfully submitted,

OSMOND K. FRAENKEL,
Counsel for Petitioner.

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[4] *Bollenbach* v. *United States*, 326 U. S. 607, 613; *Yates* v. *United States*, 354 U. S. 298, 327.